IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

Error to the District Court of Alaska for the Second Division.

UNITED STATES OF AMERICA,
Plaintiff in Error.

vs.

JOSEPH JOURDEN,
Defendent in Error.

No. 2019

Brief of Plaintiff in Error

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STATEMENT OF CASE.

This is one of two civil suits (#2259 and 2260) brought by the government against the defendant in the trial court. Only this one (#2259) comes here under the writ of error. It has been stipulated that for the present the other case (#2260)

is to remain in *statu quo* to abide the decision here.

The object of each of the suits is to recover a balance of one thousand dollars in each of the years 1910 and 1911, or two thousand dollars in each suit, alleged to be due from defendant to make up the difference between the statutory (35 Stats. 602) license fee, charge or tax, for a barroom or retail liquor license, and that required for a wholesale license for the sale of spirituous and malt liquors in Alaska during these years.

It is in effect alleged in the complaint (see copy in transcript) that defendant during those years possessed a retail liquor license, the fee for which is a thousand dollars per annum, but that he in fact went beyond his privileges thereunder and conducted a large wholesale business, the fee for which is two thousand dollars per annum. He demurred to the complaint on general grounds, but at the hearing his counsel only argued his right to keep any size of stock he chose on hand, and to make as many sales up to the limit of four and seven-eighths (4⅞) gallons per sale and delivery as he desired under his retail license, even to the same person several times on the same day, etc.

However, the court sustained the demurrer for

the sole reason (see opinion in transcript) that the remedy of the government should under the statute be a criminal prosecution instead of a civil suit. This holding of the trial court is the error complained of, and is the only point as we see it, to be decided here.

ARGUMENT.

The learned judge of the trial court, as will be seen from the opinion, based his decision on the proposition that the sections of the code enacted by congress for Alaska referred to (30 Stats. 1253) are criminal sections, and by inference exclude all right in the government to sue civilly for the doing of any act that is made a crime thereby. This is where the court erred, by misapprehending the character of the proceeding, that is, supposing it to be brought under the statute referred to. On the contrary, what the government really is contending is that the doing of the act—wholesaling under a retail license,—simply creates a plain civil liability, irrespective of and without waiving the crime connected with the doing of the act, and that for this liability it has an inherent right to recover. It is unquestioned that there are no common law crimes against the United States. Every crime

against the United States must of course be born of the violation of an express statute, but this is not generally so as to a civil liability,—even one growing out of a tort or crime. There are, no doubt, many torts that may be committed against the government which are not defined as crimes by any act of congress, yet for which the government, like any other plaintiff, may recover in a civil proceeding. and it has this right simply on general principles.

A private plaintiff can waive a tort and sue in assumpsit. Then, why cannot the government defer or even waive its right to prosecute, and sue civilly for a liability? It does not necessarily waive its right (nor has it done so in this case) to prosecute for the crime, because it seeks to recompense itself for the act or damage done to it by the defendant. If a defendant on a proper showing lawfully obtains a retail license costing a thousand dollars, as this defendant did, and under cover of it wrongfully wholesales for a considerable period at large profit to himself, without knowledged of the government officials, and thereby attempts to evade payment for a wholesale license or tax, which would cost him two thousand dollars, where is the reason

in any rule that would prevent the government from recovering the additional fee or tax, whether it waives the crime involved in the act or not?

The trial judge appears to wholly lose sight of the real contention of the government. The general proposition is not denied, that ordinarily where a new right is given and the remedy provided, that remedy and that particular one only, must be followed, but it is contended (see the transcript for a copy of the complaint) that defendant by fraud and subterfuge wholesaled while being only entitled to retail, and so became liable for the higher license, the amount of which is *fixed* and definite in the law, and that hence, the government can recover this money due in a civil action.

By demurring, defendant admits that he committed the fraud and resorted to the subterfuge. Can he also escape with the profits arising from his illegal act, or can he be made to pay for the privilege from which he derived a large profit as the government insists he can?

The government is not claiming a "fine;" if it was, then, of course, the statutory criminal mode of procedure would have to be followed. On the contrary, it is seeking to recover this money as a

part of its revenues,—as a license fee or tax, definite and fixed by the law. In other words, it is a liability,—a debt created by law for the doing of a certain class of business, for which defendant has made himself liable by his own wrong. Call it even statutory liquidated damages, if you will. Defendant had no permission to carry on a wholesale liquor business and he commits a crime when he does so without such permission. He was not supposed to be carrying it on. It is of course the sworn duty of officers of the government to prevent him from so doing. The government can effectually put a stop to his action in that regard under the statute, but the existence of the power and right to do this does not, we submit, prevent the government from recovering civilly as a part of its revenues the money due as a consequence of the illegal act of the defendant.

The court below in its opinion in substance makes the point that the people of Alaska are interested in licenses and that they may consent or refuse by a majority expression of opinion to the sale of liquor in particular localities, and that if the government could permit violations of the law by permitting people to sell liquor and then recover

the amount of the license due for this violation, it would defeat this right of the people. With all due respect, we fail to see the force of this argument, because it is hardly a legitimate one. There is no presumption that the government officials would intentionally permit such a thing to occur, yet, if any person does violate the law, why should not recovery be had civilly for a liability growing out of it? As well might it be argued, if the point made by the court is to be given force, that because a delinquent is prosecuted and a fine imposed, he thereby acquires some right to continue violating the law.

It is not denied that as set out in the opinion of trial judge, the license or Tax Act of Congress for Alaska (sections 472 and 474, Carter's Code) contemplates a criminal proceeding against those who violate it, nor that if the proceeding here was brought with the object of having a *fine* imposed or causing the imprisonment of the defendant, it would have to be by information or indictment. No matter what the government's intention may later be in that regard, such is not now its object by this proceeding.

It is submitted that neither the License Act,

supra, or any other Act of Congress for Alaska excludes a civil remedy such as is here sought to be invoked. In fact, this proceeding has no relation to the License Act, save for the ascertaining of the cost of a wholesale license, which is fixed at two thousand dollars by the Act of Congress of Feb. 6th, 1909, amending section 468 of the Alaska Code, 35 Stats. 602, bottom of page.

On the other hand, the government contends and submits that another section of the code enacted by Congress for Alaska *does* authorize and permit such a proceeding as this; section 217 of part 1 comprising the miscellaneous provisions and definitions of Carter's Code, page 44, reads as follows:

> "* * * That the omission to specify or affim in this act any liability to any damages, penalty, or forfeiture, or other remedy imposed by law, and allowed to be recovered or enforced in any civil action or proceeding, for any act or omission declared punishable herein, does not affect any right to recover or enforce the same."

And immediately thereafter section 218 provides that:

> "The common law of England as adopted and understood in the United States shall be in force in said district, except as modified by this Act."

So it can be seen the government as well as all other litigants in Alaska can avail itself of all civil common law remedies. Surely this balance of license tax due *ex maleficio* from this defendant is a statutory liability under this license or tax law, and its recovery through a civil proceeding is, under the last two above quoted provisions, permitted generally by the code and the common law.

The learned judge evidently felt bound by what he considered an authoritative ruling of the supreme court in *United States vs. Claflin,* 97 U. S. 546. But it will be seen from an examination of that case, that the statute under which the proceeding then before the supreme court was brought, is wholly different from the one being considered. That was an action in debt, whereby the government sought under the act of 1823 against smuggling, to recover under the provision of the statute "A sum double the amount or value of the goods, wares or merchandise so received, concealed, or purchased," and the court properly held that the statute clearly only intended a criminal proceeding, because it was set out in the law that the defendant "on conviction thereof" shall "forfeit and pay," etc. The liability did not occur until after conviction. There

is no such condition attaching to this proceeding. It will also be observed that in the Claflin case the amount to be recovered was not fixed or definite, because under the act then being considered, the government would first have to prove the "value of the goods, wares or merchandise received, concealed or purchased," then double that value in order to fix the liability of the defendant. In the case at bar the statute itself in the first instance by its terms fixes the fee for wholesaling liquors in Alaska at two thousand dollars, and that is the only purpose for which reference is at all made to the license act. The mere act of wholesaling, which is matter of proof, fixed the liability.

It may be admitted that because the money derived from licenses is turned over to the municipalities and people of Alaska to help defray the expense of the local government, that in an indirect way the people of the territory are interested in the collection of these licenses or taxes, but it must not be forgotten that Alaska is yet but a crudely organized territory belonging to the Nation, over which Congress has supreme sovereign power, save as limited by the Constitution. There is no completely organized local government in the sense

of having a local legislature with power to pass laws as in the other territories. The government in Alaska is carried on directly by National officials, but principally through four judges and a governor appointed under National law. Congress acts directly as to things territorial in Alaska. In fact, it is a sort of dignified Board of Aldermen for the district. Therefore, rules and considerations that might apply to private litigants often are inapplicable and of no force as to this National power in the enforcement of its laws or the collection of its revenues.

It is not denied that there are several states in the Union where the courts hold, although the soundness of the reasoning for the rules they adhere to in this regard might be subject to question, that only when direct leave is given by law can a civil proceeding be brought to recover a license fee for a violation of a license act; that it is not a contract or obligation; that it is not a debt; that it requires two parties and a meeting of minds to agree upon a contract, etc. This appears to be the rule in three or four states, particularly Kentucky, Mississippi, Arkansas and probably California, 23 Cyc. 151, subhead d. and cases cited; 17 Am. & Eng. Ency.

of Law, 2 ed. 271, subhead d. and cases cited. We do not admit the unvarying applicability of this doctrine, and especially when the government itself is the plaintiff, because the sovereign can and often does create an obligation of its citizens to pay money or to perform certain duties whether the citizens will or not, but we contend the rule should be and is, where not specifically or by necessary implication prohibited, directly the opposite Nationally, and especially when the government attempts to collect money due it for the sale of intoxicating liquors under its revenue laws.

The supreme court of the United States has held (we are quoting from the syllabus):

> "By the Internal Revenue Law the United States are not prohibited from adopting the action of debt or any other common law remedy for collecting what is due them. This is true on general principles." *Savings Bank vs. United States,* 19 Wall. 228.

It was also stated in this last cited case (page 238 Opinion):

> "That where a statute creates a right and provides a particular remedy for its enforcement, the remedy is generally exclusive of all common law remedies."

But it then proceeds:

> "But it is important to notice upon what the rule is founded. The reason of the rule is that the statute by providing a particular remedy, manifests an intention to prohibit other remedies, and the rule, therefore, rests upon a presumed statutory prohibition. It applies and it is enforced when anyone to whom the statute is a rule of conduct seeks redress for a civil wrong. He is confined to the remedy pointed out in the statute, and he is forbidden to make use of any other, but by the internal revenue law, the United States are not prohibited from adopting any remedy for the recovery of a debt due to them which are known to the laws of Pennsylvania. The prohibition, if any, either express or implied, contained in the enactment of 1866 are for others not for the government, etc."

The court then proceeds to state the well known rule of law that the King is not bound by any act of Parliament, unless named therein, etc., in the following language:

> "The most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect not him in the least, if they may tend to restrain or diminish any of his rights and interests. He may even take the benefit of any particular act, though not named. The rule thus settled respecting the British Crown is equally applicable to this government, and it has been applied frequently

> in the different States, and practically in the Federal courts. It may be considered as settled that so much of the royal prerogatives as belonged to the King in his capacity of *parens patriae,* or universal trustee, enters as much into our political state as it does into the principles of the British constitution."

It may also be noticed that the Alaska License Act, *supra,* (30 Stats. 1340, sec. 477) provides that:

> "Nothing in this act shall in any way repeal, conflict or interfere with the general laws of the United States imposing taxes on the manufacture or sale of intoxicating liquor for the purpose of revenue and known as the 'Internal-Revenue laws.' "

And also that section 3243 R. S. U. S. provides that:

> "The payment of any tax imposed by the Internal Revenue Laws for carrying on any trade or business shall not be held to exempt any person from any penalty or punishment provided by the laws of any State for carrying on the same within such State * * *."

But aside from all this, the government is here contending that this license law of Alaska is an extensive piece of revenue legislation,—a method of taxation enacted by Congress to in some measure reimburse the Nation for its heavy outlay in main-

taining the government of the District of Alaska, and whilst as to intoxicating liquors the license law is of necessity specific in terms and regulatory in its operation, it is nevertheless strictly a part of a comprehensive revenue measure. The license fees are excises within the constitutional sense of the term and are raised as local taxes imposed for the purpose of raising funds to support the local government. In fact, this is almost the language used by the supreme court of the United States when construing this very Act of Congress in *United States vs. Binns,* 194 U. S. 491.

In addition, the court is requested not to lose sight of the fact that the National Government with reference to its special taxes under its internal revenue laws as to tobacco and spirituous and malt liquors, has maintained and is under National law maintaining an entirely different rule from that of the few States above referred to, and has repeatedly brought civil suits for the recovery of amounts due as a special tax on the manufacture or sale of those products independent of and without waiving its right to prosecute criminally for the offenses involved in a violation of the laws imposing the tax. Therefore, as above stated, Alaska being

peculiarly under the protective wing of the National Government, and the enactment of a local code for the jurisdiction being merely a matter of National expediency and administrative convenience, it is submitted, that a similar rule should prevail locally in Alaska, and that even in the absence of sections 217 and 218 of the Alaska code above referred to, a civil action is maintainable to recover the revenues.

After an examination of the cases in some of the States holding to the rule that the requirement to pay a license is not a debt, and without assuming any superior criticism, it is respectfully submitted that they do not proceed on sound reasoning, even under the laws of such States. Their courts seem to follow without question one or two ill considered and probably inadvertant cases and the encyclopedias thereafter echo the result as law. No good reason can be adduced why any government, state or federal, even in the absence of any specific statute directly authorizing it, should not have the right to collect amounts which the law says its citizens shall pay, if they do a certain sort of business, and this without waiving its right to prosecute those same citizens for the crime involved.

It will be seen that Chap. 44 of the License Act of Congress for Alaska, 30 Stats. 1335, is entitled as "of miscellaneous provisions in relation to criminal proceedings in justice courts" and that it begins with section 453 and continues to section 481 inclusive of the main Act; yet, section 460 specifies and fixes the license fee or tax per annum for doing, carrying on or following more than forty different kinds of ordinary business, callings or avocations. It is true section 461 provides a penalty and a mode of prosecution for carrying on any of these lines of business or following any of the specified avocations without having obtained a license, and it is also true that section 462 and some of the following sections refer specifically to the sale of intoxicants, but would it be reasonable to say that the government of the United States through its administrative officers in Alaska would be without alternative driven to indicting any person who refused to pay the license or tax, if it chose to waive or defer a criminal prosecution, instead of having the right to sue civilly for the amount due as the same is definitely fixed in the law itself? It is respectfully submitted that it would be unreasonable to so hold. The right to levy and sue for taxes is an in-

herent attribute of sovereignty. It can be seen that the liquor license sections of this Alaska license fee Act, are but a small portion of the whole body of legislation enacted for the district. Other recent Acts of Congress with reference to fisheries impose licenses or taxes for the catching, boxing and barreling of fish at so much per pound, case or barrel. See act of June 26, 906, 34 Stats. 478. The wharfage tax which is a part of the license act we are discussing and covers the entire district of Alaska is fixed at ten cents per ton and amounts in some instances to large sums of money per annum. Would it be sound reasoning to contend that for a violation of the Act in this regard the government would be unable to sue civilly, but instead would be obliged to await the meeting of a grand jury to return indictments for daily violations? Instances could arise that would necessitate the finding of hundreds of indictments against a few persons to recover a relatively small sum of money. To thus distort the possibilities is often the best way of pointing out an untenable position. As illustrative of this point, in the case of *Jones vs. Stewart,* decided by the supreme court of Georgia, in 1893, 44 S. E. 879, the court held that unless the legislature has so

stated in unequivocal language, it would not hold that a criminal prosecution is the sole remedy for the collection of taxes; that such a holding would be opposed to common sense, sound business principles and a wise public policy,—and that a court ought not to do it, save when there is no escape from the letter of the law.

Can it be said that there is no escape from the letter of the License Act of Congress for Alaska that we are here discussing, from holding that it contemplates only a criminal prosecution to the exclusion of a civil remedy? With all due respect to the trial judge, it is at least very hard to believe that such is a proper view to take of the law. On this particular point the supreme court of Alabama in *State vs. Fleming,* 20 Southern 847, which was a case very similar to the one at bar, because it was not brought to recover a fine, but was to recover the amount of a license fee as fixed by law, said:

> "We cannot reasonably conceive that it was ever intended that the collection of taxes, whether assessed upon property or imposed upon avocations, should be left to the *discretion of a grand jury,* to be exercised, perhaps, differently under like circumstances, or that the liability for taxes should be established beyond a reasonable doubt. It must be borne in mind that the

> present action is not to recover the penalty imposed for the violation of a statute. It may be that if the suit was for the amount of the fine,—that is, three times the amount of the taxes,—it could not be done except by indictment."

But not all the states hold to this so called rule that the law itself must give specific leave to bring a civil suit for the recovery of fines or forfeitures involving criminal acts. It was held in Missouri in *Knox vs. Hunolt,* 19 S. W. 628, that:

> "The right to bring such suit (civil action) is not taken away by Rev. St. 1879, sec. 1331, which makes the misappropriation of County funds a crime punishable by fine or imprisonment."

In like manner it was held in Alabama in *State vs. Fleming,* 20 Southern 846, *supra,* that:

> "The provisions of Cr. Code, Sec. 3829, declaring that any persons engaged in carrying on a business for which a license is required, without having taken out such a license, shall on conviction be fined three times the amount thereof, cannot be construed as excluding the right of the State to maintain a civil action for the recovery of such a license."

A quite instructive case, where the supreme court in a measure reasons out the proper construction to be given to such statutes as we are here discussing is that of *Hepner vs. U. S.,* 213 U. S.

103, which was decided as recently as April, 1909. Mr. Justice Harlan's opinion in that case is a learned essay covering the entire history of the subject and citing the principal cases almost from the beginning of our government. One of the principal holdings is that:

> "A penalty may be recovered by a civil action, although such an action may be so far criminal in its nature that the defendant cannot be compelled to testify against himself therein in respect to any matter involving his being guilty of a criminal offense."

Still more recent is the decision of the same court in Novembe, 909, in *United States vs. Stevenson,* 215 U. S. 190, where Mr. Justice Day, delivering the opinion of the court, also reviews the authorities to some extent, and as we think, supports the view we are here advocating. The case was the exact reverse of the one at bar, and it was held, quoting from the syllabus that:

> "The fact that a penal statute provides for enforcing the pescribed penalty of fine and forfeiture by civil suit does not necessarily exclude enforcing by indictment; and so held in regard to penalty for assisting the immigration of contract laborers prescribed by sections 4 and 5 of the Immigration Act of Feb. 20, 1907."

We submit that the License Tax Act enacted by Congress for Alaska and which we are discussing, exhibits no intention to deny the government the ordinary remedies, and is not intended to be exclusively criminal,—therefore, such denial ought not to be inferred.

We are free to admit that the most cogent sentence in the opinion of the trial judge is: "It will be noted that our statute does not declare a forfeiture of the license fee or two thousand dollars, and that it may be collected by an appropriate remedy by simply imposing a penalty for the violation of the law by way of a fine or imprisonment." But we insist that this sentence has cogency only because the learned judge seemed to have in view the idea that the government was suing to recover a penalty, which it is not doing. If his view in this regard were to obtain, then it could also be held that the same is true as to every one of the more than forty lines of business, callings and avocations mentioned in the entire License or Tax Act, and surely this would not be seriously contended. It would drive the government to the confession of the fact that Congress prevents it from collecting a single dollar of tax in the whole district of

Alaska, save by information or indictment. With all due respect this is unreasonable.

THEREFORE, the demurrer in the lower court should have been overruled, the defendant should have been obliged to answer the complaint, and the government permitted to prove its case, if it can.

All of which is respectfully submitted.

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S. v. Chamberlainm
219 U.S. 250.